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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

Filed
MAY 29 2009
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

MICHAEL R BERUBE,

Plaintiff,

vs.

HSBC BANK USA, AS TRUSTEE FOR

NOMURA ASSET ACCEPTANCE

CORPORATION MORTGAGE PASS

THROUGH CERTIFICATES SERIES 2005-

AR6, ET AL.,

Defendant

Case No.: No. C09-00127-JF(PVT)

FIRST AMENDED COMPLAINT
(VACATE TRUSTEE SALE AND
DAMAGES FOR FORCIBLE DETAINER)

INTRODUCTION

1. Plaintiff originally brought this action in the Superior Court of the State of California in and for the County of Monterey. Defendant caused the case to be removed to the above-entitled Court where the action is now pending based on the Federal question issues presented in Plaintiff's original State Court complaint. Defendant then moved the Court to dismiss the case for among other reasons that Plaintiff had not stated a Federal claim for relief in its RICO action allegations. In the within First Amended Complaint, Plaintiff does not seek to pursue the RICO claims and instead seeks to

1 pursue its claims for relief for wrongful foreclosure and its new claim for
2 damages based upon its claims of forcible detainer (lockout). Since the
3 Federal claims are no longer at issue in this First Amended Complaint,
4 Plaintiff requests that the action be remanded back to the State Court.
5

6 2. Plaintiff is an individual residing in Monterey County, California. The real
7 property residence which is the subject of this action is located at 54
8 Southbank Road, Carmel Valley, Monterey County, California (the "subject
9 property"). A legal description of the subject property is attached as Exhibit
10 1 and incorporated by this reference. Plaintiff is informed and believes that
11 Defendant is a financial entity, form unknown, doing business in Monterey
12 County California. The Note and Trust Deed documents relevant to the
13 allegations set forth herein were executed in Santa Clara County, California.
14 Plaintiff is informed and believes that Defendant was not and is not the
15 holder of the underlying note relative to the deed of trust recorded relative to
16 the subject property.
17

18 **FIRST CLAIM FOR RELIEF – REQUEST TO VACATE TRUSTEE**
19 **SALE ON WRONGFUL FORECLOSURE**
20

21 3. In July 2005, Plaintiff executed a note and deed of trust (recorded July 11,
22 2005) relative to the subject property. The note was made in favor of
23 Alliance Bancorp. Plaintiff is informed and believes that MERS was named
24 as beneficiary in said deed of trust as nominee only with no authority or
25 power to assign the deed of trust without the underlying note and
authorization of the payee on the note, Alliance Bancorp.

1
2 4. On or about July 13, 2007 Alliance Bancorp filed a chapter 7 bankruptcy
3 petition and said bankruptcy case remains open and active to date. Plaintiff
4 is informed and believes that all assets of Alliance, including all beneficial
5 interest in the Note and Deed of Trust relative to the subject property are
6 part of the bankruptcy estate being administered by a chapter 7 trustee.
7 Plaintiff is further informed and believes that there has been no bankruptcy
8 court authorization to transfer said assets from the bankruptcy estate and that
9 the Alliance Bankruptcy estate has not transferred or assigned its interest in
10 the note and deed of trust relative to the subject property. There has been no
11 valid transfer or assignment of said note and deed of trust.

12
13 5. On or about October 5, 2007, Plaintiff is informed and believes that
14 Defendant caused a notice of default to be recorded with Monterey County
15 Recorder (doc# 2007075923) relative to the subject property and said note
16 and deed of trust. At the time of such instruction and the recordation of said
17 notice of default, Defendant was not authorized to commence a foreclosure
18 under California's non-judicial foreclosure procedures as set forth in
19 California Civil Code section 2924 et seq. in that as of that time, no
20 recordation of assignment had occurred. A purported assignment of the deed
21 of trust (Monterey Recorder Doc# 2007080498) was recorded on October
22 19, 2007 (even though the Notice of Default by Defendant was recorded
23 October 5, 2007). The statutory scheme for nonjudicial foreclosure
24 authorizes the commencement of a notice of default and foreclosure by an
25 assignee only if the assignment has been first recorded as set forth in CC
section 2932.5.

1
2 Further, Defendant executed its substitution of trustee upon which its
3 foreclosure was based on November 19, 2007 which was not recorded until
4 November 29, 2007, well after the commencement of the subject foreclosure
5 by Defendant in October of 2007 and there was as such no authorization to
6 so proceed with the Notice of Default at the prior time.

- 7
8 6. The Notice of Default was thus defective and ineffective and the subsequent
9 Trustee Sale on or about April 15, 2008 was based upon an invalid Notice of
10 Default both because the statutory scheme had not been complied with and
11 because there could be no valid and effective assignment of the Note and
12 Deed of Trust by Alliance without its chapter 7 Bankruptcy Court's prior
13 approval, which was not obtained.

14
15 **SECOND CLAIM FOR RELIEF – DAMAGES FOR FORCIBLE**
16 **DETAINER (LOCKOUT)**

- 17
18 7. On or about October 9, 2008,. while Plaintiff was still in possession of the
19 subject property, Defendant, by itself or via its authorized agent acting
20 within the scope of its agency, caused the locks to be changed on the subject
21 residence property and gates to said property effectively and wrongfully
22 locking Plaintiff out of his residence. Such action caused extreme
23 inconvenience, distress and humiliation to Plaintiff. Notices were wrongfully
24 posted on and around Plaintiff's house for all his neighbors to see, thus
25 further humiliating Plaintiff.

1 8. At the time of such "lockout", Plaintiff had not been served with any
2 eviction action and there as no Court order authorizing Defendant or its
3 agents to change locks or enter the premises, as they did.

4 9. As a result, Plaintiff suffered emotional distress and humiliation and lost the
5 peaceful and quiet enjoyment of the residence. Although Plaintiff has
6 subsequently reobtained access to the residence, his and his family's sense
7 of peace and security in the home has been shattered.

8 10. The actions of Defendant in wrongfully evicting Plaintiff were done with
9 callous disregard for Plaintiff's rights and feelings and were arrogant to the
10 extent that they were intentional and malicious towards Plaintiff and warrant
11 the award of punitive damages.

12
13 WHEREFORE, PLAINTIFF REQUESTS THE FOLLOWING RELIEF:

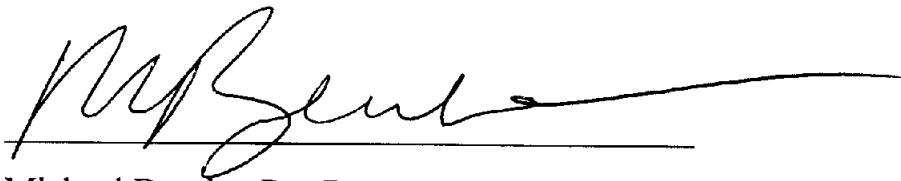
14 FIRST CLAIM FOR RELIEF:

- 15 I. An order vacating and setting aside the Trustee's Sale and Notice of
16 Default relative to the subject property located at 54 Southbank Road,
17 Carmel Valley, California;
- 18 II. A Declaration that the purported assignment to Defendant was without
19 legal authorization and invalid;

20 SECOND CLAIM FOR RELIEF:

- 21 III. Damages on account of Defendant's wrongful eviction and to
22 compensate Plaintiff for the distress, humiliation and loss of quiet
23 enjoyment of his residence in a sum of not less than \$50,000 or in such
24 amounts as proved at the time of trial and punitive damages in this matter
25 commensurate with the wrong done and Defendant's financial status, as
determined by the Court.

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A handwritten signature in black ink, appearing to read 'Michael Berube', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael Berube, Pro Per

DESCRIPTION:

THE REAL PROPERTY IN CITY OF CARMEL VALLEY, COUNTY OF MONTEREY, STATE OF CALIFORNIA, DESCRIBE D
AS:

LOT "U" AS SAID LOT IS SHOWN ON THAT CERTAIN MAP ENTITLED, MAP OF "ROBLES DEL RIO CARMEL SUB D,
NO. 3", MONTEREY COUNTY, CALIFORNIA, FILED FOR RECORD JUNE 7, 1932 IN THE OFFICE OF THE COUNTY
RECORDER OF THE COUNTY OF MONTEREY, STATE OF CALIFORNIA, IN VOLUME 3 OF MAPS, "CITIES AND
TOWNS", AT PAGE 87.

APN: 189-501-020

Ex 1

Proof of Service by Mail:

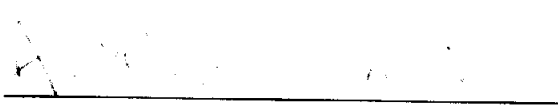
Re: U.S. District Court, Northern District of California, San Jose Division
Case c09-00127-JF(PVT)
Berube v HSBC Bank, etc

I hereby declare under penalty of perjury of the laws of the State of California as follows:

That I am not a party to the within lawsuit and that I am over the age of 21 years. I reside in Monterey County, California. My address is: 241 Main Street, Salinas, CA

On May 29, 2009, I served the Defendant through its Attorney of record in this action with a true copy of Plaintiff's First Amended Complaint by placing a true copy in a sealed envelope, postage pre-paid first class, and I deposited the envelope in the U.S. mail in Salinas, California on said date addressed as follows:

Dean A. Chrisopherson, Esq.
1111 Civic Drive, suite 380
Walnut Creek, CA 94596



Anthony Lane